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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),
Petitioners,

vs.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NEW YORK STATE AFL-CIO AS AMICI CURIAE

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The brief amici curiae is filed with the consent of the parties, as provided in Rule 42 of the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners in this case rely heavily on the findings of fact made by the District Court, after a lengthy trial, concerning the impact of unemployment compensation benefits on the labor dispute between petitioners and CWA. Respondents set forth contrary evidence on this impact question, evidence which indeed would have justified, and may have required, opposite findings. And, *amici* Dow Chemical Co. et al. and Rochester Telephone Co. et al. set forth facts concerning the alleged impact of unemployment compensation benefits upon other labor disputes, those in which the *amici* employers were involved.

The Court of Appeals in this case, however, regarded the question of the precise impact of New York's unemployment compensation law, or of any other state's law, upon a particular labor dispute, or upon labor disputes generally, as irrelevant. Instead, it treated the question as one involving solely a question of Congressional intent, and therefore as a question which is not to be resolved by a trial.

In this respect, the Court of Appeals rejected the approach of *Grinnell Corp. v. Hackett,* 475 F.2d 449. In that case, the First Circuit, believing that "unambiguous Congressional intent [is] lacking" (*id.,* at 457), ordered a trial on the questions first, whether the payment of unemployment benefits to strikers after a period of disqualification constitutes a "palpable infringement" on federal labor policy (*id.,* and second, whether, if so, the state's interest outweighed

that of the federal government. The Second Circuit in this case declined that approach because:

> "Here, as in most pre-emption cases, a positive expression of congressional intent is lacking, and the Court must resort to the drawing of inferences. In the instant case, the evidence upon which those inferences must be based is relatively one-sided." (566 F.2d 388, 391).

The Second Circuit's opinion on the merits amply bears out that conclusion, as we develop in Part II of the Argument.

I. First, however, in Part I, we explain that even if the question of Congressional intent were as close as the *Grinnell* court thought it to be, that court's method for answering it would be unsound. For, as this Court's recent opinion in *Malone v. White Motor Corp.,* ..... U.S. ....., 46 U.S.L.W. 4295, stresses, in pre-emption cases, "the purpose of Congress is the ultimate touchstone." (*Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103). And, in determining that intent, it is the obligation of courts to "reconstitute the gamut of values current when the words were uttered." (Letter from Judge L. Hand, quoted in Lesnick, *The Gravamen of the Secondary Boycott,* 62 Col. L. Rev. 1363, 1393-4 n. 155). This approach, rather than either a battle of experts or a quest for explicit statutory resolution of the asserted conflict between national labor policy and a particular state statute, was the method which was used in *Malone,* and which must be used here.

In Part I(B), we discuss the contention that this Court's decision in *Nash v. Florida Industrial Com-*

mission, 389 U.S. 235, demands reversal of the decision below. We show that *Nash* involved a situation in which the federal policy vindicated—access to federal remedies—was one as to which there is indeed a presumption favoring pre-emption. Moreover, *Nash* would be pertinent only if we were relying solely on the general permission granted states under the Social Security Act to set eligibility standards, rather than on that permission couplied with the compelling evidence, reviewed in Part II, that Congress considered this *particular* problem and determined to include it within the general permission granted.

II. In Part II, we survey the legislative materials, including both those relied upon below and others. First, we demonstrate that the structure of the Social Security Act designedly left to the states all questions concerning eligibility for unemployment compensation benefits, except for a few federal standards included in Section 903 of the Act. Given this structure, it is indeed not surprising that there is no explicit permission granted to the states to pay benefits to strikers. The statutory scheme was such that only prohibitions, and not permissions, had to be spelled out.

Second, we show that Congress was specifically aware in 1935 that the question of the relationship between unemployment benefits and the nascent national labor policy would have to be faced. Congress, however, determined to resolve this question only partially, through the few substantive protections contained in Section 903. The larger question of benefits for strikers Congress declined to address, despite the

fact that the draft bill suggested to the states by the Committee on Economic Security which advised the legislation dealt with the problem. Further, in devising an unemployment compensation program for the District of Columbia in 1935, and for railway employees in 1938, Congress did address the striker question, resolving the question differently in the two instances both from each other, and from the draft state bills. Thus, rather than illustrating, as petitioners would have it, Congress' view upon the resolution of the issue appropriate to national labor policy, these actions illustrate that Congress was quite aware that the labor dispute problem was one inherent in the formation of an unemployment compensation system but nonetheless included the issue within the general broad scope given the states in devising programs. We note, finally, that Congress was, in particular, aware of the New York statute, which had already been passed in substantially its current form when the Social Security Act was under debate, and we demonstrate that the experience rating aspect which was added to the New York statute in 1951 can not possibly detract from the implicit sanction given the New York variant on the labor dispute question.

Third, we discuss two arguments made by petitioners, and by amici appearing on their behalf, which purport to illustrate that an exclusion of strikers was inherent in the statutory scheme of the Social Security Act. The first, that the Act intended to compensate only involuntary unemployment, fails for two reasons: The New York labor dispute provision is

exactly parallel to the draft state bills' sections on voluntary unemployment disqualifications. And, the voluntary/involuntary distinction is necessarily incapable of resolving the labor dispute issue. The second argument, that strikers are "employees" and therefore not unemployed, fails because Congress in 1947 specifically rejected this construct, and also because there is no necessary uniformity between the meaning of "employee" in the National Labor Relations Act and the concept of unemployment established for the entirely different purpose of providing income to those without remunerative work.

III. Until Part III, we entertain the assumption that in fact the policy of the NLRA might, but for Congressional intent to the contrary, demand government neutrality in labor disputes through the denial of benefits to strikers. In this Section, we show that Congress has not in fact entertained that assumption. The few times Congress has established a uniform national policy on the payment of social benefits to strikers, it has determined to pay those benefits, and has made that decision on the ground that *failure* to do so would constitute a lack of neutrality.

Further, there are cogent arguments, many adopted in academic commentary in the early years of the Social Security Act, favoring the view that labor dispute disqualifications in fact interject the government on the employer's side of labor disputes. We survey these arguments, not for the purpose of proving their validity, but rather to show that there is no self-evident answer to the neutrality question. In

this regard, we illustrate that even if one could come to a conclusion regarding the "proper" general approach, one would still have to make a myriad of decisions on various subsidiary questions. This task could involve judicial rewriting of the labor dispute disqualification provisos of virtually every state. Because a general "neutrality" principle is not sufficient for this task, this Court should not attempt to create a uniform approach to the problem when Congress declined to do so.

ARGUMENT

I

WHETHER OR NOT STATES ARE FORBIDDEN, BY THE NATIONAL LABOR RELATIONS ACT, TO PROVIDE UNEMPLOYMENT BENEFITS TO SOME WORKERS UNEMPLOYED DUE TO A LABOR DISPUTE MUST BE DETERMINED BY DISCERNING THE INTENT OF CONGRESS FROM ALL AVAILABLE MATERIALS.

Petitioners, and amici appearing on their behalf, begin by positing an erroneous framework for assessing the pre-emption question here at issue. They contend that pre-emption of any state enactment which conceivably could influence the resolution of a labor dispute must be presumed, and that this presumption is rebutted only where there is an express, unambiguous statement of Congressional intent to permit that particular kind of legislation by the states.[1] Moreover,

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[1] *See* Pet. Br., at 33-34, 43, 44; Br. for Chamber of Commerce, at 11, 15, 18; Br. for Dow Chemical Co., et al., at 21, 24; Br. for Rochester Telephone Corp., et al., at 15, 16, 17, 27.

We agree with the Court of Appeals in this case that the legislative intent to permit wide variation in state unemployment

they maintain that in discerning that intent, the focus must be solely on the National Labor Relations Act, rather than upon other indications that the states are free to act with respect to certain matters.[2]

Both of these contentions were definitively laid to rest this past term in *Malone v. White Motor Corp.*, ... U.S. ....., 46 U.S.L.W. 4295. In *Malone*, the Court began from *Teamsters v. Oliver,* 358 U.S. 283, which held that in general state legislation may not, because of the free collective bargaining mandated by the NLRA, prescribe terms of a collective bargaining agreement relating to mandatory subjects of bargaining. (*Malone,* 46 U.S.L.W., at 4299). The Court noted, however, that this rule itself was "*implied* from the relevant provisions of the labor statutes" (*id.,* at 4297) and that, where there are indications in another federal statute that the implication is not merited as to a specific kind of state legislation, the Court "must spell out from *conflicting indications* of congressional will the area in which state action is permissible." (*Garner v. Teamsters Union*, 346 U.S. 485, 488 (1953) (emphasis supplied) quoted in *Malone*, 46 U.S.L.W., at 4297.)

The Court, in *Malone*, proceeded to survey the language and legislative history of a federal statute entirely separate from the NLRA—the Welfare and

insurance laws as they pertain to labor disputes is, while not explicit, plain enough to remove any ambiguity. (566 F.2d 388, 391). Nontheless, it is important that the issue be put in proper perspective at the outset, so that the attempts to debunk the indices of intent relied upon by respondents may properly be evaluated.

[2]*See* Pet. Br., at 40; Br. for Chamber of Commerce, at 12.

Pension Plans Disclosure Act of 1958, 72 Stat. 997—and to conclude that the Disclosure Act was "a far more reliable indicium of congressional intent with respect to state authority to regulate pension plans" (*Malone,* supra, 46 U.S.L.W., at 4297) than the broad, general principles of the NLRA.

Thus, the *Malone* Court relied on the principle that, in pre-emption cases, "[t]he purpose of Congress is the ultimate touchstone" (*Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, quoted in *Malone*, 46 U.S.L.W., at 4297).[3] And, in discerning that purpose, it sur-

[3]It is particularly instructive that the admonition that "the purpose of Congress is the ultimate touchstone" was stated in the *Schermerhorn* case. For there, the Court was concerned with §14(b) of the NLRA, which authorizes the States to forbid the execution and enforcement of union security agreements which would otherwise be lawful as a matter of federal law under a proviso to §8(a)(3) of the NLRA. The State right-to-work laws which were thus left free to operate have a marked impact on the relative collective bargaining strength of unions and employers—that is why management and labor have over the years devoted substantial resources to the question of whether §14(b) should have been enacted and whether it should be retained.

Schermerhorn illustrates that to be given effect, the Congressional determination not to pre-empt state activity despite an impact upon the industrial balance of power need not be stated affirmatively and explicitly either in the statute or in legislative history. In *Schermerhorn*, the precise question was whether Congress, in permitting states to outlaw union security clauses, had also intended to permit states to enforce such prohibition in state courts. On this question there was not a word in the statute, nor was there an explicit declaration of Congressional intent in the legislative history. Nonetheless, the Court concluded that "since it is plain that Congress left the States free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws." (*Id.*, at 102) Thus, once it had determined that in a particular area "Congress • • • chose to abandon any search for uniformity" (*id.*, at 104), the Court did not require an unambiguous intent to permit a *particular* form of state activity in the area; instead, it reasoned from the general, clear permission to determine Congress' likely intent with regard to a particular variant of the

veyed "the total corpus of pertinent [federal] law and the policies that inspired ostensibly inconsistent provisions" (*Boys Markets v. Clerks Union*, 398 U.S. 235), rather than erecting a presumption of pre-emption and seeking explicit, unambiguous statutory language rebutting that presumption.

Petitioners, and amici appearing in their support, seek to distinguish *Malone* as a case where the congressional purpose to permit state regulation expressly and definitively indicated a purpose to create an exception to the NLRA bar to state regulation.[4]

The Disclosure Act, however, merely declared generally that that Act shall not be interpreted as displacing state regulation in the area of pension plans; no mention is made in the statute itself of intent to permit state substantive regulation of collectively bargained plans. But the Court in *Malone* did not, on that basis, as would be required under petitioner's theory, declare that the NLRA precluded such regulation. Rather, it turned to the legislative history, and to the statute's underlying purpose, and concluded that since "the 1958 Disclosure Act clearly anticipated a broad regulatory role for the states . . . we cannot hold that the [state] Pension Act is nevertheless implicitly pre-empted by the . . . NLRA." 46 U.S.L.W., at 4299. This conclusion was reached

problem. (*See also* the earlier *Schermerhorn* case, *Retail Clerks v. Schermerhorn*, 373 U.S. 746; *Algoma Plywood Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307-312.)

[4]*See* Pet. Br., at 34-35 n.29; Br. for Chamber of Commerce, at 12 n.3; Br. for Rochester Telephone Corp., et al., at 16; Br. for Dow Chemical Co., et al., at 32-33.

despite the fact that, as of 1958, "the states had thus far attempted little regulation of pension plans" (*Malone*, 46 U.S.L.W., at 4299), with the result that Congress could not possibly have assessed from experience the impact of such regulation upon the collective bargaining process.[5] And, this conclusion was reached by the majority although three justices, agreeing in this regard with the Eighth Circuit, saw the general permission to the states to regulate pension plans in the Disclosure Act as "ambiguous". (46 U.S.L.W., at 4300 (Powell, J., dissenting); see *id.* (Stewart, J., dissenting).)[6]

Thus, the Court in *Malone* did not seek, nor did it find, an explicit, unambiguous indication that Congress in 1958 considered the impact of state pension regulation upon the national labor policy. Rather, since two federal enactments, the NLRA and the Disclosure Act, arguably bore on the issue at hand, the Court approached the problem as one of harmonizing two federal statutory schemes where the Congressional intent as to the proper accommodation was not absolutely lucid.

[5]*Compare* the argument made in this case that the 1935 Congress cannot be taken to have sanctioned labor dispute statutes of the New York variety since none were yet operative. *See, e.g.*, Pet. Br., at 46.

[6]The AFL-CIO, one of the present amici, filed a brief amicus curiae in *Malone*, supporting the result ultimately reached by the Court. In assessing the evidence regarding Congressional intent as to state substantive regulatioin of pension plans, the AFL-CIO specifically noted that that evidence was "less clear than in . . . other federal statutes [but] on balance we believe . . . Congress intended to permit Minnesota to regulate pensions as it did." (Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in *Malone*, *supra*, No. 76-1184, at 26; *see also id.*, at 6, 27.)

Similarly, in this case, the question whether Congress in enacting both the NLRA and the Social Security Act intended in a particular area to permit diversity rather than uniformity of regulation, despite some possible impact on the balance of economic power in the collective bargaining area, must be approached as an ordinary problem of statutory construction, including the resolution of any ambiguities which may appear. This task involves, in the words of Judge Learned Hand, "an imaginative projection upon the occasion that has arisen of what would have been the choice of the lawmakers," and the "'best effort to reconstitute the gamut of values current at the time when the words were uttered." (Lesnick, *The Gravamen of the Secondary Boycott,* 62 Col. L.Rev. 1363, 1393-4, n. 155, quoting a letter from Judge Hand.) It does not involve, as petitioners would have it, an independent interest balancing venture guided only by overall general NLRA principles concerning free collective bargaining.

B. Petitioners' heavy reliance on *Nash v. Florida Industrial Comm'n,* 389 U.S. 235, where the Court held that the states may not withhold unemployment benefits from an individual because she filed an unfair labor practice charge, as supporting their approach to the pre-emption question in this case is entirely misplaced.

The right to resort to a remedial tribunal without state discouragement protected in *Nash* is one which has roots deeper than the national labor policy or, indeed, than any particular substantive federal policy.

We would expect, for example, that the same result would have been reached in *Nash* if the state had cut off benefits upon the filing of any federal court action, or upon the filing of a complaint with any federal agency. Similarly, the *Malone* result, permitting state regulation of pension plans despite interference with free collective bargain, would not sanction, we would expect, a state law requiring that a pension be denied any person who filed a complaint with the NLRB, or the EEOC, or the FCC, or a federal court. Thus, it appears that the federal policy protected in *Nash* is the overriding principle of free access to remedial tribunals, requiring no delphic piercing of the inherent presumptions of this or that federal statute to perceive, and concerning which there is indeed a presumption that the states, the federal government and private persons may not interfere.

For example, *Eastern Presidents RR Conf. v. Noerr Motor Freight Co.,* 365 U.S. 127, and its progeny construed the unqualified language of the Sherman Act as not reaching conspiracies to monopolize the institution of proceedings in the courts and administrative agencies. *NLRB v. Marine & Shipbuilding Workers,* 391 U.S. 416, read into the NLRA the rule that union interference with the filing of NLRB charges is an unfair labor practice, even though §8(a)(4), which specifically so provides with respect to employers, has no parallel in §8(b) of the Act, and even though there were some indications that the Landrum-Griffin Act affirmatively permitted the particular type of interference complained about. And, *Mitchell v. Robert*

De Mario Jewelry, Inc., 361 U.S. 296, found implied the availability of back pay to a person discharged for filing a complaint under the Fair Labor Standards Act, despite a statutory proviso arguably limiting the availability of this remedy.

For this reason, it is not surprising that the Court in *Nash* made no mention of the broad range of options preserved to the states in the Social Security Act. It would be indeed unusual if Congress, in passing one federal statute, had indicated in any manner that states may, under that statute, discourage resort to remedies provided under another federal statute. And, in fact, no part of the Social Security Act, of the legislative history surrounding it, of Congressional treatment of similar questions in other statutes, or of post-1935 attempts to modify either the Social Security Act or the NLRA, suggests any sanction of state compensation statutes conditioning benefits on nonpursuit of any federal remedies. Nor do these materials indicate any perception that the problem was one necessarily inherent in an unemployment compensation system. It follows that petitioner's argument based on *Nash* would have force, if at all, only if the Court of Appeals, and respondents, were relying solely on the general principle that the Social Security Act left states largely free to establish conditions on the receipt of unemployment benefits, rather than on this principle coupled with a panoply of indications that Congress affirmatively recognized and considered, at various times, the necessary and inherent interrelationship between re-

ceipt of unemployment benefits and the economics of labor disputes and determined to leave the matter of this relationship to the states. See Part II, *infra*.

Thus, *Nash* is not inconsistent with the approach of *Malone*, or of *Schermerhorn*. Rather, it involved a situation in which for reasons entirely independent of the presuppositions of the national labor policy, there *is* a presumption against state action, and in which there were no "conflicting indications of congressional will" (*Garner, supra*) tending to rebut that presumption.

II

CONGRESS SPECIFICALLY CONSIDERED, BOTH IN 1935 AND LATER, THE RELATIONSHIP BETWEEN UNEMPLOYMENT BENEFITS AND COLLECTIVE BARGAINING AND DETERMINED TO PERMIT VARIATION AMONG STATES IN THIS REGARD.

The relevant inquiry, then, is whether the sum of the legislative materials evinces an affirmative Congressional decision to permit states to pay unemployment insurance to strikers. The evidence in this regard is much stronger than that available on the parallel issue in *Malone*. The arguments to the contrary proceed from a misunderstanding of the structure of and relationship between the Social Security Act and the NLRA.

A. The original National Labor Relations Act (Wagner Act) and the basic legislation creating a national unemployment insurance program (Titles III

and IX of the Social Security Act of 1935) moved through the Congress at the same time. The Wagner Act was enacted into law on July 5, 1935, and the Social Security Act became law on August 14, 1935.[7] Senator Wagner was a sponsor of both pieces of legislation, and was the member of Congress most responsible for the format of the unemployment insurance aspects of the Social Security Act.[8] There is nothing in the Wagner Act which deals with striker eligibility for unemployment compensation benefits. But the intent of the 1935 Congress is clearly revealed in the Social Security Act: Eligibility of strikers was to be

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[7]

Wagner Act	*Social Security Act*
Senate Debate May 14-16, 1935	House Debate Apr. 11-19, 1935
House Debate June 19, 1935	Senate Debate June 14, 15, 17-19, 1935
House Acceptance of Conference Report June 27, 1935	House Acceptance of Conference Report Aug. 8, 1935
Senate Acceptance of Conference Report June 27, 1935	Senate Acceptance of Conference Report Aug. 9, 1935
Presidential Signature July 5, 1935	Presidential Signature Aug. 14, 1935

[8]Senator Wagner was the author, in 1934, of the Wagner-Lewis bill, H.R. 7659, 73rd Cong., 2d Sess. (1934), an unemployment compensation bill upon which extended hearings were held in the House of Representatives, but which was not reported out of committee in either House. The provisions of the Social Security Act regarding unemployment compensation were modeled on the Wagner-Lewis bill, after much discussion within the Committee on Economic Security designated to draft the Act whether to abandon the co-operative federal-state Wagner-Lewis model in favor of a national program, or one with tighter federal standards. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21, 28-32 (1945); Witte, *The Development of the Social Security Act* (1962), at 3, 111-125. Senator Wagner was also the only member of Congress consulted in the initial drafting of the Social Security Act (Witte, *The Development of the Social Security Act*, at 77), and he was the first witness in the Senate hearings on the bill. (*Id.*, at 81)

left to the states in furtherance of the broad policy of state freedom of action which was preserved in this "scheme of cooperative federalism" (*King v. Smith*, 392 U.S. 309, 316), subject only to certain minimum standards prescribed by §903 of the federal law.

Under the scheme of Titles III and IX of the Social Security Act of 1935,[9] states obtained federal funds for the payment of unemployment compensation benefits if they adopted unemployment compensation laws which were approved by the Social Security Board. Section 903 of the Act required the Social Security Board to approve any state law which satisfied certain conditions; the only conditions dealing with eligibility for benefits was set forth in §903 (a)(5):

> "(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization . . ."[10]

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[9]49 Stat. 620; these titles are presently codified at 26 U.S.C. §3301, *et seq.*, 42 U.S.C. §501, *et seq.*, and 42 U.S.C. §1101, *et seq.*

[10]Section 903 is presently codified as 26 U.S.C. §3304(a)(5). That section now provides that the Secretary of Labor, rather than the Social Security Board, shall be the official who exercises the certification function.

In all other respects the states were to be free to create their own eligibility standards.[11]

The broad leeway thus given the States was a matter of conscious choice by Congress. The intent was that:

> "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." (S. Rep. No. 628, 74th Cong., 1st Sess., p. 4).[12]

[11]The Dow Chemical brief (at 23 n.7) suggests that Congress meant to allow variations among states with respect to financing arrangements, but not with respect to benefit criteria. This contention is belied by statements in the Senate Committee Report on the Social Security Act (S.Rep. No. 628, 74th Cong., 1st Sess.), the Report of the Committee on Economic Security which drafted the Act (H. Doc. No. 81, 74th Cong., 1st Sess., pp. 13, 16), the account of the Chairman of that Committee (Witte, *The Development of the Social Security Act, supra,* at, e.g., 58, 62, 115, 116, 122, 123, 125), the opinion in *Steward Machine Co. v. Davis,* 301 U.S. 593, approving the Act, and the recent opinion in *Ohio Bureau of Employment Security v. Hodory,* 431 U.S. 471. And, it is belied as well by current administrative interpretation and by the actual development of state unemployment statutes, which vary enormously in their eligibility requirements generally, and their labor dispute provisions particularly, as well as in many other ways. "The Federal law contains no requirements concerning eligibility and disqualification provisions except the labor standard provisions . . . . Each State establishes its requirements which an unemployed worker must meet to receive unemployment insurance." U.S. Department of Labor, *Comparison of State Unemployment Insurance Laws* (rev. Jan. 1975), at 4-1; see also *id.*, generally and particularly, at iii; 4-1 *et seq.*; 4-10; 4-41; 4-42; 4-43, for examples of the degree of variations among state laws on eligibility generally, and labor dispute disqualification particularly. (The discussion in the *Comparison* on labor dispute disqualification appears as an Appendix to this Brief.)

[12]This reservation of broad powers to the States was adopted over the opposition of some who believed that the program should be wholly administered and controlled by the federal government. The Committee on Economic Security whose elaborate report formed the framework for President Franklin D. Roosevelt's recommendation for social security legislation and was transmitted as the substantive appendix to the President's message to Congress on Economic Security, wrestled with the issue of federal standards and control for many months. The Committee ultimately concluded:

> "A federally administered system of unemployment compensation is undoubtedly superior in some respects. . . . All things considered, however, we deem it the safest and soundest policy to confine the role of the Federal Government, with respect to this problem at this time. . . . The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish." (H.Doc. No. 81, 74th Cong., 1st Sess., pp. 13, 16.)

See Witte, *The Development of the Social Security Act, supra,* for an account of the internal disputes concerning federal versus state standards, and for the view (at 116) that doubts about whether it was possible, without experience, to prescribe adequate federal standards was a chief reason for declining to do so.

This structure of the Social Security Act—that is, the understanding that states were free to prescribe eligibility standards *except* for the provisions of 903 (a)(5)—undermines entirely the argument that the failure of Congress expressly to grant permission to states to pay benefits to strikers is crucial. For, the structure Congress determined to adopt for the unemployment insurance scheme precluded the necessity for spelling out which variants upon that scheme were to be approved; given that structure, the only necessity was to spell out prohibitions. Since Congress did not affirmatively prohibit the payment of unemployment insurance to strikers, and since such payment is consistent with the standards Congress did impose, Congress could, without more, be taken to have determined such payments to be consistent with federal law.

B. There is, however, more.

1. First, and most important, the problem of the interrelation of unemployment compensation and the system of free collective bargaining was directly considered by the framers of the 1935 Social Security Act. Section 903(a)(5), the only section of the Act setting substantive standards, dealt directly with this relationship, and set, as the only federal standards in this area, the requirements that unemployment benefit standards may not (a) require workers to be strikebreakers; (b) affect union bargaining position by artificially depressing wages in an area; or (c) undermine unions by fostering yellow-dog contracts and company unions. This section of the 1935 Act was taken verbatim from the 1934 Wagner-Lewis bill, so that it was actually Senator Wagner, the author of the NLRA, who devised it. (See, Witte, *Development of the Social Security Act, supra,* at 136).[13]

Section 905(a)(5)(A), forbidding the states to disqualify workers from eligibility for unemployment compensation benefits for refusing to accept new work "[i]f the position offered is vacant due directly to a

[13]There were at least two attempts to alter what became §903(a)(5) in the course of devising the 1935 Act. First, employers objected to the company union provision before the Committee on Economic Security, but President Green of the AFL-CIO succeeded in persuading the Committee to retain the provision as it was in the Wagner-Lewis bill. (Witte, *Development of the Social Security Act, supra,* at 136.) Second, there was a controversy over the prevailing wage provision while the bill was before Congress, which was settled only when Senator Wagner intervened and assured retention of his earlier language. Until the prevailing wage issue was settled, support of organized labor for the entire Social Security Act was in doubt. (*Id.,* at 88.)

strike, lockout, or other labor dispute," is of particular significance. Plainly, this provision reduces employee incentive to engage in strikebreaking, and accordingly limits the struck employers access to the pool of the unemployed, the most likely source of labor. In this respect, payment of benefits to persons who, without such benefits, might be compelled to take work in a struck plant to provide for subsistence affects the economic balance of power in much the same way as payment to strikers themselves. Nonetheless, Congress made the deliberate choice that states could not penalize workers who refused to act as strikebreakers by denying them unemployment benefits.

This choice is significant *first* because it illustrates an awareness of the fact that payment or non-payment of benefits can affect labor disputes; *second,* because despite this realization, the more obvious but parallel problem of the existing work force of a struck plant was not addressed with any federal standard; and *third,* because the actual choice made—to *require* payment despite an effect on the labor market and hence on the economics of labor disputes—illustrates that Congress in 1935 did not view such a choice as fundamentally inconsistent with the nascent national labor policy.

2. The issue whether and under what conditions to grant or deny benefits to those who are themselves on strike or out of work due to a labor dispute at their place of employment was plainly recognized in 1935 as a problem the state unemployment compen-

sation statutes would have to address. In the draft bill prepared for the use of state legislatures contemplating entry into the unemployment compensation program, the Committee on Economic Security made the "suggestion" that the states disqualify from eligibility persons whose unemployment is due to a labor dispute. (The first of these draft bills was before Congress.) (See Witte, *The Development of the Social Security Act, supra,* at 125; Social Security Board, *Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types* (1936) (cover page); Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., at 601, 621.) The inclusion of this "suggestion" demonstrates that the framers were well aware that there was a policy issue to be faced here; the fact that it was merely a "suggestion" and not included, as was the prohibition on requiring unemployed persons to act as strikebreakers to be eligible for benefits, in the basic commands of the statute, demonstrates that the statutes like that in New York were to be allowed to continue in effect.

Also noteworthy is that the two sets of draft bills—those devised by the Committee on Economic Security before the Act passed, and those devised soon after the Act's passage by the Social Security Board charged with administration of the Act—*differed* in their labor dispute provisions. The former disqualified any employee if his unemployment was "due to a labor dispute still in active progress at the establishment in which he is or was last employed," (Hearings,

supra, at 601, 621); the latter disqualified employees only if there was a "stoppage of work," and then only if:

> "He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
>
> 2. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;
>
> and provided further that if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall for the purposes of this subsection be deemed to be a separate factory, establishment or other premises." (*Draft Bills, supra,* at §5(d).)

Adoption and application of these different provisions in various states could result in quite a different balance of economic power in labor disputes. For, the Committee on Economic Security bill might disqualify individuals unemployed "due" to a labor dispute, but having no interest in it, and might disqualify strikers even though they were permanently replaced and had no jobs to return to. The Social Security Board's draft attempted to circumscribe those disqualified to eliminate these possibilities. This difference could affect the powers of economic resist-

ance of employers (see *Hodory, supra,* 431 U.S., at 492), and yet both were declared consistent with federal law by official bodies intimately connected with the Act in its infancy.

Thus, the presence of the labor dispute disqualification language in the draft bills has quite the opposite significance to that ascribed by petitioners and amici. That language confirms the indications in §903(a)(5) that Congress in 1935 was quite aware that states would be constrained to face the labor dispute question, and affirmatively determined to leave the resolution of that question to the states.

3. Similarly, the fact that Congress has always excluded strikers from the District of Columbia's unemployment compensation scheme is no gauge at all of Congress' national intent, and instead, confirms the purpose of permitting variation among states on the problem.

Whenever Congress enacted a law which explicitly permitted a degree of choice in state programs, it was required, prior to the advent of D.C. home rule, to switch hats and, acting in essence as a state legislature for the District, make policy choices from the options available just as the states are obliged to do. Thus, in the present situation, if the passage in 1935 of a statute excluding compensation to strikers in the District tells us anything, it reinforces the conclusion that Congress in 1935 was quite aware that a state legislature acting under the Social Security Act would have to face the question whether to provide benefits

to strikers, and it nonetheless left that question within the permissive area.[14]

Further, the labor dispute provision of the first District of Columbia unemployment compensation statute differed from that in *both* draft bills; it disqualified employees only if their unemployment was "directly due to a *strike* or *jurisdictional labor dispute.*" (49 Stat. 950, emphasis supplied).

Once again, the difference between this language and that "suggested" by the Committee on Economic Security and the Social Security Board could well have some impact on behavior of the parties to a labor dispute—for example, an employer might be unwilling to engage in a lockout under the 1935 D.C. bill, and therefore lose whatever tactical advantage might be gained thereby, while, since the Committee on Economic Security language would apply to lockouts as well as strikes, a covered employer under the draft bill would not face that constraint. Thus, Congress, in drafting the D.C. bill, took advantage of precisely that permission to draw whatever lines it desired in regard

[14] An analogy to the situation under §14(b) of the NLRA is helpful: Congress in 1947 enacted a statute permitting states to pursue their own union security policy. It then permitted union security clauses to continue in effect in the District. (See *Giant Food Shopping Center, Inc.,* 77 NLRB 791 (1948).) Thereby, it chose for the District from the options available to the states, but did not derogate from the express statutory permission to the states to disagree with its choice.

to labor dispute disqualifications which it had granted to the states.[15]

4. In 1938, only three years after the passage of the Social Security Act, Congress again had occasion, in enacting the nationally-uniform Railway Unemployment Insurance Act (RUIA), to set directly for a certain group of covered employees the benefit eligibility standards which it had left to the states in 1935.

This time a different balance with regard to labor dispute disqualifications was struck than that included in any of the draft bills *or* in the D.C. law: strikers could be disqualified only if the strike violated the Railway Labor Act or his union's rules; there would be no disqualification in case of a lockout; and, if there was an illegal or unauthorized strike, then those employees disqualified would be limited to those with an interest in the outcome of the strike. 45 U.S.C. §354 (a-2), (b).

The limitation language is substantially that of the Social Security Board Draft Bill. Thus, the 1938 Congress was clearly aware of the "suggested" work stoppage language contained in that draft, and determined to reject it in favor of a different approach.

The explanation of petitioners and amici of the RUIA striker provisions—that they represent a specialized accommodation to the Railway Labor Act,

[15]In 1943, Congress added lockouts to the D.C. labor dispute disqualification, but added as well the limiting language from the Social Security Draft Bill to circumscribe those individuals affected to those with an interest in the outcome of the dispute. (57 Stat. 100).

which it is said, differs from the NLRA in its emphasis upon use of economic weapons—disregards the fact that airline employees have been covered since 1936 by the Railway Labor Act (45 U.S.C. §181) but were not included in the RUIA (see 45 U.S.C. §351 (a)). Congress consequently could not have regarded the RUIA striker provisions as integral to the scheme of the RLA. For, by leaving airline employees out of the RUIA, it necessarily subjected them to the disuniform labor dispute disqualifications of the various state laws and, in many instances, to disqualification even where the strike was a legal one.

The RUIA, therefore, illustrates once again that Congress was quite aware of the labor dispute disqualification issue inherent in devising unemployment compensation laws, and that, in those instances in which Congress itself set benefit standards, it adopted various provisions on benefits during labor disputes rather than adhering to a rigid view of the matter. It would be odd, indeed, had Congress intended to impose upon the states a uniformity which it did not itself exercise.

5. Finally, there is the fact that the New York statute had already been enacted when the Social Security Act was passed, with substantially the same labor dispute disqualification as now exists, and that Congress was aware of the New York Act. (S. Rep., *supra,* at p. 13). Moreover, since an editorial appeared in the New York Times on April 21, 1935 (at p. 16) decrying the labor dispute disqualification provision as government subsidy for strikers, it is likely that

members of Congress then engaged in considering the Social Security Act were aware of that provision, and of the arguments against it. Yet it is said, among other things, that the New York statute at the time had no experience rating system, so that the alteration of economic power worked then and now differed.

If this argument is meant to imply that a strikers' provision may be valid if the benefits paid out are not reflected in the employer's tax rate,[16] it merely exposes the central problem with petitioners' entire theory: that it would require courts to determine, from the vast number of permutations of labor dispute provisions in use or enacted in the future, which variants strike precisely the balance the national labor policy demands. (See Part III (B) *infra.*) For, Congress in 1935 certainly did not suggest this limitation upon payment of benefit to strikers; indeed, it expressly gave states permission to adopt experience rating systems, without qualifying that permission with strictures concerning payments during labor disputes.

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[16]Provisions in state laws exempting from the experience rating computation the costs of benefits of certain types are not uncommon. See *Comparison, supra,* at 2-10; see also, J. Becker, *Experience Rating in Unemployment Insurance: Virtue or Vice* (Upjohn Institute, 1972), at 27. Thus, while we are not aware of any such provision, a state could well choose to pay benefits to some strikers but not to include such benefits in experience rating computations.

Further, experience rating systems differ widely among themselves as to the method used for determining the variable tax rate, and as to the degree of sensitivity of the tax rate to differences among employers in benefit charges. See *Comparison, supra,* at 2-8 to 2-13; J. Becker, *supra,* Chapter II.

Moreover, the entire notion that the unemployment system, especially where there is an experience rating system, is a "transfer" of funds from employers to employees, and therefore particularly objectionable, is inconsistent with this Court's declarations on the matter. In *Carmichael v. Southern Coal Co.*, 301 U.S. 495, the court declared that contributions required of employers under state unemployment compensation statutes are "[t]axes" since they "are but the means of distributing the burden of the cost of government." (*Id.* at 508). Thus,

> "[p]ayments of unemployment compensation [are] not made to employees by [employers] but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation to respondent, but to carry out a policy of social betterment for the benefit of the entire state." (*Labor Board v. Gullett Gin Co.*, 340 U.S. 361, 364.)

And, *Gullett Gin* specifically rejected the contention that an experience rating system somehow alters this conclusion. (*Id.* at 365.)[17] Since the experience rating

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[17]It is also worth noting that, while the experience rating system does gauge taxes to benefits paid, there is not, as petitioners suggest, a one-to-one ratio. For, New York, like other states "[has] stopped far short of complete experience rating . . . There is a substantial amount of sharing benefit costs." (J. Becker, *supra,* at 4; see *id.*, at 30, for the calculation that in 1967, over 37.6% of all benefits in New York were not charged to individual employer accounts, with the chief reason being that there is a maximum tax rate regardless of experience.)

system is merely one of several ways to peg the taxation rate, and since Congress specifically contemplated in 1935 that many states would adopt this method, the fact that New York had no such system in 1935 cannot be taken as evidence that Congress meant to permit benefits to strikers only if the employer's tax rate were not affected.

Thus, it is clear that the Congress that passed both the Wagner and Social Security Acts had addressed the question of whether payment of unemployment benefits should be made to strikers and had determined that permitting the States to do so was wholly consistent with its intentions.

5. Titles III and IX of the Social Security Act of 1935 have been amended many times. But the provisions with which we are here concerned have remained unchanged, and the understanding that they permit but do not require states to pay benefits to workers involved in a labor dispute still holds sway. As Congressman Mills, the Chairman of the House Ways and Means Committee and the floor manager of the Employment Security Amendments of 1969 stated in discussing an administrative proposal to forbid unemployment insurance payments to strikers:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. There are a lot of decisions in this whole program which are left to the States. For example, there are two States, I recall, which will pay unemployment benefits when employees are on strike . . . That is their privilege to do so. They are taxing their employers within the State to pay unemployment benefits. If the legislature wants to do it, why not let them do it? I would not vote for it, and the gentleman would not vote for it, but if the States want to do it we believe they ought to be given latitude to enable them to write the program they want." (115 Cong. Rec. 34106 (1969).)

"Not lightly vacated is the verdict of quiescent years." (*Coler v. Corn Exchange Bank,* 250 N.Y. 136, 141, 164 N.E. 882, 884.)

In sum, in dealing with the extent to which unemployment compensation benefits would be available in the strike context, as in dealing with the extent to which union security agreements would be lawful, Congress has chosen "to abandon any search for uniformity . . . and decided to suffer a medley of attitudes and philosophies on the subject," (*Shermerhorn, supra,* 375 U.S. at 104-105). Given that choice, a state decision to ultilize the authority reserved to it by federal law to pay such benefits (so long as the conditions set out in § 903 are observed) no more raises a Supremacy Clause question than a state decision to adopt a so-called "right-to-work" law (within the confines noted in *Schermerhorn, id.,* at 105). In each instance, while it is the state that acts, it is Congress that has set the policy permitting that action.

C. Petitioners and amici suggest that, despite all of the evidence that Congress in 1935 was quite aware of the problem of unemployment benefits in labor disputes and determined to leave the issue to the

states, a preclusion upon strikers' benefits is somehow inherent in the structure of Social Security Act.

This argument rests on two contentions, each of which is entirely incorrect: first, that the Social Security Act permits payment only to persons involuntarily unemployed in the sense that they lost their last job for reasons beyond their control, and second, that since a person on strike has not severed entirely his relationship with his former employer, he may not be considered unemployed at all under the Social Security Act.

1. As to the first contention, it is true that all the states have exercised their discretion as regards payment of unemployment benefits by imposing some requirements designed to assure that beneficiaries are not without work entirely because of their own preference. (See U.S. Department of Labor, *Comparison, supra*, at 4-1 et seq.). Yet, while, as appellants state, Congress' main concern *was* with persons involuntarily unemployed, there is no express federal requirement that benefits be so limited, and there is therefore no federal proscription stating the manner in which to accomplish such a limitation, or the sense in which unemployment must be "involuntary."

The 1935 Committee on Economic Security draft bills provide as follows with respect to persons who are "voluntarily" unemployed in some sense:

> "(5) *Voluntary leaving.*—An employee who has left his employment voluntarily without good cause connected with such employment shall be ineligible for benefits for the week in which such

> leaving occurred and for the 3 next following weeks; provided, moreover, that such weeks shall be charged (as if benefits for total unemployment had been paid therefor) against the employee's most recent weeks of employment (by the employer in question) against which benefits have not previously been charged hereunder.
>
> "NOTE.—The above subsection (5) is considered to be equitable. The period of disqualification may, of course, be lengthened, or the person quitting voluntarily without reasonable cause may be entirely disqualified, if the State so desires.
>
> "(6) *Discharge for misconduct.*—An employee who has been discharged for proved misconduct connected with his employment shall thereby become ineligible for benefits for the week in which such discharge occurred and for not less than the 3 nor more than the 6 next following weeks, as determined by the commission in each individual case; provided, moreover, that the ineligible weeks thus determined shall be charged (as if benefits for total unemployment had been paid therefor) against the employee's most recent weeks of employment (by the discharging employer) against which benefits have not previously been charged hereunder, and shall also be counted against his maximum weeks of benefit per year." (Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., "Economic Security Act," Feb. 9, 1935, p. 601).[18]

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[18]The 1936 Social Security Board draft bills (at 9) similarly provided:

> "Section 5. DISQUALIFICATION FOR BENEFITS
> "An individual shall be ineligible for benefits:
> "(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for

As noted, the draft bills are uninformative upon what Congress thought the Act *required,* but they do indicate what Congress, and the Social Security Board, thought the Act permitted. Thus, those who fashioned and administered the Act clearly did not contemplate that persons in some sense responsible for losing their last jobs could not receive benefits, although they apparently deemed it desirable to discourage voluntary quits and misconduct by imposing a relatively short period of deprivation of benefits.[19]

not less than one nor more than the five next following weeks, (in addition to the waiting period) as determined by the commission according to the circumstances in each case.

"(b) For the week in which he has been discharged for misconduct, if so found by the commission, and for not less than one nor more than the nine next following weeks, (in addition to the waiting period) as determined by the commission in each case according to the seriousness of the misconduct.

"*Note* 1: The above subsections (a) and (b) are considered equitable. The period of disqualification may, of course be lengthened or shortened, or the person discharged for misconduct or quitting voluntarily without reasonable cause may be entirely disqualified, if the State so desires, but a state should give serious consideration to the injustice of such entire disqualification if employee contributions are required. There is submitted below an alternative provision providing for such entire disqualification in cases of discharge for misconduct."

[19]Many states, and the District of Columbia, do now pay persons who have voluntarily quit or been discharged for misconduct, after a short waiting period. See U.S. Department of Labor, *Comparison, supra,* at 4-27 to 4-34.

This form of disqualification—a relatively short waiting period in addition to that uniformly imposed on all claimants—was the predominant form in the early years of the Social Security Act. As of December 31, 1937, 45 states took this approach to voluntary leaving, and 44 to discharge for misconduct. Kempfer, *Disqualifications for Voluntary Leaving and Misconduct,* 55 Yale L.J. 147, 147-148 (1945). The District of Columbia statute passed by Congress in 1935 had disqualifications as short as one week (see 49 Stat. 950).

After the waiting period, as long as the claimant was able and available for work and sought out job opportunities, it was felt that the unemployment was indeed "involuntary."

New York, by imposing a relatively lengthy waiting period upon benefits for strikers, has thereby adopted precisely the approach to this disqualification suggested in 1935 with regard to "voluntary" unemployment.[20] Thus, even if each person affected by the labor dispute disqualification were considered to have "voluntarily" left his last job, the New York approach could not be deemed inconsistent with the Act.

Moreover, the drafts bills (and most current state laws, see *Comparison, supra,* at 4-5 to 4-6) limited disqualification to those who voluntarily quit without good cause. The New York labor dispute temporary disqualification, and those of most other states which do pay strikers under some circumstances, have no such limitation. Thus, even if the strike is caused by a wage cut, an unfair labor practice, a breach of a collective bargaining agreement, a failure to pay the prevailing wage, or some other circumstance which might well constitute "good cause" if an individual resigned for that reason, a striker disqualification could apply if a group of employees struck for that same reason. On the other hand, the alternative—

[20]While Rhode Island is the only other state currently taking this approach to labor disputes, as of 1940 there were five states in addition to New York with similar provisions, at least two of which had considerably shorter disqualification periods than that in New York. See Fierst & Spector, *Unemployment Compensation in Labor Disputes,* 49 Yale L.J. 461, 462 (1940).

looking into the merits of a labor dispute to decide if those on strike were striking for "good cause"—might indeed embroil state agencies directly in that sphere of labor relations reserved to the disputants.

Similarly, many of the labor dispute disqualification provisions, including that in New York, make no attempt to separate those voluntarily taking part in the strike from those affected thereby but not participating.[21] And, lockouts are excepted from some state labor dispute provisions, but not others. (See Appendix; see also *Hodory, supra.*) In this sense, too, the labor dispute provisions sweep broader than an individualized determination of involuntary unemployment. And, once again, the alternative—investigating the personal motivation of each person out of work on account of the dispute—could have a more intrusive effect upon labor relations than class judgments.

Thus, the involuntary unemployment concept, rather than having the import suggested by petitioners, points in quite the opposite direction: it demonstrates that ordinary concepts of voluntariness and involuntariness do *not* necessarily prescribe an obvious answer to the labor dispute problem, and that, for that very reason, it was recognized in 1935 that the issue would have to be addressed separately and diversely in the various state acts. See also Part III(B), ***infra.***

[21]Even the version in the Social Security Board Draft Bill, which makes some attempt to separate the interested employees from others, still disqualifies individuals in the same classification as the strikers even if they actively oppose the strike.

2. The second contention regarding an implicit determination of the striker issue in the Social Security Act is premised primarily upon the observation that strikers are "employees" under the National Labor Relations Act (§§ 2(3) and 9(c)(3).) The assertion is that they therefore cannot simultaneously be unemployed for purposes of receiving benefits designed to replace lost wages. This contention is entirely misconceived.

First, and most important, Congress in 1947 specifically *rejected* this equation between the definition of "employee" in the NLRA and receipt of unemployment benefits.

The wisdom of permitting strikers to draw unemployment compensation was then, as it is now, a controversial issue. For example, there had been industry and press criticism of Pennsylvania's unemployment payment of benefits to striking miners in 1946.[22] The House of Representatives' version of what became the Taft-Hartley Act would have attempted to end the practice by declaring that strikers who accepted unemployment compensation benefits would thereby forfeit their status as employees and lose the statutory right to reinstatement which flows therefrom. (Cf. *Labor Board v. Mackay Radio Corp.,* 304 U.S. 333.) This was to be accomplished by amending the statutory definition of "employee" to exclude any person "receiving unemployment compensation from

[22]Committee on Ways and Means, House of Representatives, 79th Cong., 2nd Sess., Hearings on Social Security Legislation, p. 1384.

any state."[23] The House Committee on Education and Labor report explained the purpose of this provision:

> "A few States pay strikers after the fifth, sixth, or seventh week of a strike. This clearly is a perversion of the purposes of the social security laws, which Congress intended to provide for unemployment compensation for those out of work invountarily and through no fault of their own. We therefore have provided that a striker's status as an 'employee' stops when he starts receiving unemployment compensation from any State. He may receive relief from his union, from local welfare funds or from charity without losing that status."[24]

The Senate, however, did not adopt this proposal. Instead, it determined to "follow the provision of the existing law [regarding the definition of 'employee'] with three exceptions," none of which touched the rights of strikers.[25] The Senate's view prevailed on this issue, although the House version of the definition of "employee" was adopted in other respects.

It is contended that this sequence is equivalent to mere Congressional silence. To the contrary, the decision to reject a provision enacted by one house of Congress which would have had substantially the

[23]H.R. 3020, 80th Cong., as reported out, p. 4, and as it passed the House, p. 4, reprinted in I Legislative History of the Labor-Management Relations Act of 1947 (hereafter "1947 Leg. Hist."), at pp. 34, 161.

[24]House Report No. 245 on H.R. 3020, 80th Cong., pp. 12-13, 1947 Leg. Hist., pp. 303-304.

[25]House Conference Report No. 510, 80th Cong., 2d Sess., p. 33.

effect sought in this lawsuit must be taken to constitute a rejection of the premise of that provision—that there is a fundamental inconsistency between the NLRA and the payment of unemployment insurance to strikers. See *Labor Board v. Drivers Local Union,* 362 U.S. 274, 288-290.

Furthermore, definitions in federal statutes of terms such as "employee" are explicitly limited in their application to the particular statute involved (see, e.g. 29 U.S.C. § 152), and the definition of such terms varies greatly from one statute to another, in accord with the purpose and coverage of that statute. As Justice Holmes wrote, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 425. Particularly is this true of the word "employee". See *United States v. American Trucking Association,* 310 U.S. 534, 545, n. 29. To begin importing a definition of "employee" from one federal statute to another is to do violence to the congressional intent to limit the definition to the statute in which it appears, and to the underlying purposes of the statute into which it is imported.

Finally, there are many other categories of persons who are "employees" under the National Labor Relations Act but *are* considered unemployed within the meaning of the unemployment compensation program. For example, persons laid-off for economic reasons are considered "employees" for purposes of the NLRA if "they [have] a reasonable expectancy

of further employment in the foreseeable future." (*Scobell Chemical Co. v. NLRB,* 267 F.2d 922 (C.A. 2). Under this test, ordinary laid-off employees are regularly held to be "employees" within the definition of the NLRA. (*Scobell, supra*; *American Export Lines,* 81 NLRB 1499; *Sullivan Surplus Sales, Inc.,* 152 NLRB 132; *D & H Farms,* 192 NLRB 53.) Yet, such persons can clearly be unemployed within the meaning of the unemployment compensation law of every state, if they are not in fact working. Indeed, since "[t]he purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers to 'tide themselves over, *until they get back to their old work* or find other employment * * *'" (*California Department of Human Resources v. Java,* 402 U.S. 121, 131, quoting H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935) (emphasis supplied)), they are at the core of those whom the unemployment compensation system was intended to protect.[26]

Thus, it is simply not true that a person who is an employee for labor relations purposes, and thus entitled to protection as regards certain interactions

[26]Similarly, part-time employees are considered "employees" for purposes of the NLRA regardless of the number of hours worked (see 29 U.S.C. § 152 (3)), although the regularity and extent of work is considered to be relevant regarding whether there is sufficient community of interest with full-time employees for unit-determination purposes. See, e.g., *Hurst Corp.,* 221 NLRB No. 67; *Sears, Roebuck & Co.,* 193 NLRB 330; *Sears, Roebuck & Co.,* 172 NLRB No. 132; *Scoa, Inc.,* 140 NLRB 1379. Yet the unemployment statutes of all states treat some persons working part-time as unemployed. See U.S. Department of Labor, *Comparison, supra,* p. 3-9.

with his employer or former employer, cannot be unemployed for purposes of determining whether he is entitled to benefits designed for persons who are not in fact receiving sufficient income. The federal labor relations system is designed only with regard for the responsibilities of employees, unions and employers *vis à vis* each other; its concepts are entirely uninformative in deciding whether a person is within the group which Congress intended to benefit in an entirely separate income support program. In this respect, also, the contention that the proper uniform answer to the striker problem is somehow implicit in the NLRA, or the Social Security Act, or both, must fail.

III

CONGRESS DOES NOT CONSIDER PLAINTIFF'S ABSOLUTIST VIEW OF A FREE LABOR MARKET TO BE ESSENTIAL TO COLLECTIVE BARGAINING.

To this point, we have assumed *arguendo* that the "calculus of [federal] laws regulating labor-management disputes" (*Super Tire Engineering Corp. v. McCorkle,* 416 U.S. 115, 124) does, as plaintiff argues, create a collective bargaining system which is hermetically sealed from all governmental influence, while demonstrating that Congress has determined not to completely occupy this field but rather to authorize the states to pay unemployment compensation to strikers if they wish to do so. We now turn to a demonstration that since passing the Wagner Act, Congress has not only permitted the states to pass and enforce benefit programs that affect the labor

market, but has itself structured such programs in a manner that affects the balance of power between employers and unions.

A. As the earlier discussion illustrates, the federal standards embodied in the unemployment compensation program themselves provide a significant example. For § 903(a)(5) sets the condition that benefits may not be denied because an unemployed person will not take a job for an employer involved in a labor dispute. This command does potentially alter the balance of power during a strike, but was adopted nonetheless.

Moreover, in the two similar federal government benefit programs of which we are aware in which the federal government has maintaining plenary control, Congress has demonstrated that it does not share plaintiff's view of the incompatibility of free collective bargaining and the payment of government benefits to strikers. The Railway Unemployment Insurance Act, adopted three years after the Social Security Act of 1935, has already been discussed. Congress provided for payment to strikers under the RUIA despite the objection of employer representatives that railroad employers would thereby be given more favorable treatment than employees in the great majority of the States, which disqualified strikers unreservedly. The Railway Unemployment Insurance Act has frequently been amended, and on two occasions (1959 and 1963) there were changes in the disqualification provisions.[27] But the provision regarding striker eligibility has been preserved intact.

[27] 73 Stat. 31, 77 Stat. 222.

The remaining piece of relevant legislation is the Food Stamp Act of 1964, as amended.[28] As orginally passed, § 5 of that Act provided:

> "Participation in the food stamp program shall be limited to those households whose income is determined to be a substantial limiting factor in the attainment of a nutritionally adequate diet.
>
> (b) In complying with the limitation on participation set forth in subsection (a) above, each State agency shall establish standards to determine the eligibility of applicant households. Such standards shall include maximum income limitations consistent with the income standards used by the State agency in administration of its federally aided public assistance programs. Such standards also shall place a limitation on the resources to be allowed eligible households. The standards of eligibility to be used by each State for the food stamp program shall be subject to the approval of the Secretary."[29]

Three years later the House Committee on Agriculture "received testimony of * * * the use of stamps to support participants in voluntary work stoppages or labor disputes."[30] The Committee proposed, and the House adopted, an amendment to § 5(b) providing:

> "Notwithstanding any other provision of law, any person who is engaged in a strike, labor dispute, or voluntary work stoppage shall be ineligible to participate in any food stamp program established pursuant to this Act: Provided, That if any such person was eligible for and was receiving food

[28] 78 Stat. 703, 7 U.S.C. § 2011, *et seq.*

[29] 7 U.S.C. § 2014.

[30] H. Rep. No. 1619, 90th Cong., 2d Sess., p. 2.

> stamp assistance pursuant to the provisions of this Act prior to the existence of a strike, labor dispute, or voluntary work stoppage, such person shall not be ineligible for participation in the food stamp program solely as a result of engaging in such strike, labor dispute, or voluntary work stoppage."[31]

The Senate refused to accept that amendment, and in conference the House receded. The statement of the managers on the part of the House declared:

> "3. *Strikers and students eligibility*—The House bill made strikers and students ineligible to participate in the food stamp program under certain conditions. The conference substitute deletes this House provision and leaves the determination of eligibility to be made under the existing law."[32]

Thus, at that point the situation was that which had obtained with regard to unemployment compensation in 1947: The House had proposed that a benefit program that had been administered by the states in a manner that permitted strikers to be eligible be amended to forbid that practice, the Senate rejected that proposal and the result was a determination by Congress to follow the "existing law."

But the evolution of the Food Stamp Act did not end at that point. In 1970, § 5 of the Food Stamp Act was amended again, in this instance to empower the Secretary of Agriculture to establish "uniform na-

[31] *Id.*, at p. 4.

[32] H. Conf. Rep. No. 1908, 90th Cong., 2d Sess., p. 2.

tional standards of eligibility." At this point, it became necessary to prescribe federal standards as to the eligibility of labor dispute participants, rather than leaving the matter to the states along with other eligibility problems.

The result was the determination that "refusal to work at a plant or site subject to a strike or lockout" shall not be a basis for ineligibility. (84 Stat. 2049, amending 7 U.S.C. § 2014). The statement of the managers on the part of the House as to this provision stated:

> "The conference substitute also makes it clear that the refusal to accept work at a plant or site which is subject to a lock-out is the equivalent to the refusal to accept work at a struck plant or site and thus will not, by itself, be the basis for denying food stamp assistance to any person."[33]

In light of plaintiff's contention that the payment of benefits to strikers is incompatible with federal labor relations law, the following passage from the House Report that recommended the provision preserving food stamps for strikers in the 1970 uniform federal standards is particularly pertinent:

> "The committee debated at length the question of striker participation in the Food Stamp Program; it rejected a provision which would have automatically made strikers ineligible for food stamps. In lieu of such a provision the committee adopted language which clearly states that no person (neither a striker nor a nonstriker) need ac-

[33] H. Conf. Rep. 91-1793, 91st Cong., 2d Sess., p. 7.

> cept employment or training at a struck plant or site. The committee does not wish to take sides in labor disputes and does not believe this bill is the proper place to solve labor-management problems. The Secretary, through regulation, is free to establish whatever requirements he deems appropriate as to the method and time for strikers to register for employment or training at facilities not subject to a strike."[34]

The short of the matter is this: The contention that the system of free collective bargaining mandated by the NLRA entails a requirement of governmental neutrality in the sense that strikers may not be paid benefits pursuant to programs based on insurance or need principles is a pure construct. For, the evidence provided by Congress' actions and words in dealing with this precise problem demonstrates that Congress' conception of government neutrality is to permit the states to decide whether strikers shall be eligible under cooperative federal-state benefit programs, and to pay strikers on the same basis as all other workers in the same financial position in those programs as to which the federal government retains plenary control.[35] It is not for the appellees, or the courts, to dis-

[34]H. Rep. No. 91-1402, 91st Cong., 2d Sess., p. 3.
There was, last year, another attempt to disqualify strikers from the food stamp program. Once again, the proposal was rejected as constituting federal pressure against striking workers. H. Rep. No. 95-464, 95th Cong., 1st Sess. (1977).

[35]This, of course, points to the fallacy in the argument that Congress specifically provided benefits for strikers when it wished to and must be taken to have intended the opposite when there is no explicit provision. For, Congress has made a decision about benefits for strikers only in enacting uniform federal benefit programs, as to which it was compelled to address the question. In every

turb this view of the proper role of the government in strike situations.

B. The conclusion reached by Congress in those instances in which it was obliged to choose a uniform federal standard on social benefits for strikers is supported by academic commentary which appeared in the first decades after the passage of the Social Security Act. It is useful to summarize some of the arguments made in favor of *eliminating* (or substantially contracting) the labor dispute disqualifications, for they indicate that the "neutral" position is at least not self-evident.

First, the labor dispute disqualifications entail, in large part, a discrimination against strikers, as compared to other unemployed workers. For,

> "If the 'voluntary' nature of an individual's employment is to be the test, there would seem to be as much reason to consider the economic and psychological pressures which may be present in the case of a concerted leaving of work as in the case of an individual leaving." (Lesser, *Labor Disputes and Unemployment Compensation,* 55 Yale L.J. 167, 171 (1945).)

And,

> "If it is socially desirable to pay benefits to workers who have left unsuitable employment or refuse to accept such employment, there seems to be no good social reason for denying benefits to workers on strike because of conditions which make the work unsuitable." (*Id.*)

instance in which eligibility standards are left to the states, the labor dispute issue was not addressed by Congress but, rather, left to the states.

This discrimination was itself seen as injecting government into the balance of economic power, since "by ignoring the merits of the dispute, the state may often penalize employees for attempting to achieve the aims to which enlightened social legislation has pointed." Fierst & Spector, *Unemployment Compensation in Labor Disputes,* 49 Yale L.J. 461, 464. See also Lesser, *supra,* at 170; Schindler, *Collective Bargaining and Unemployment Insurance Legislation,* 38 Col. L. Rev. 858, 874.

Second, either the presence or absence of benefits will be likely to have an effect upon labor disputes:

> "Accepting the thesis that unemployment compensation systems should be neutral in labor disputes, it by no means follows that benefits should be denied. To the extent that payment of benefits would have the unneutral effect of supporting workers and fostering strikes, the denial of benefits would have the unneutral effect of supporting employers and discouraging strikes and fostering lockouts. Nor does the fact that workers denied benefits are no worse off than if the unemployment compensation law had never been passed alter the effect of the denial of benefits. The very existence of the law with the promise of benefits to those who do not in concert with other workers refrain from working amounts to considerable pressure to deter workers from combining their economic strength. This is particularly true if union membership or the payment of union dues is construed to amount to participation in, or financing of, the dispute." (Lesser, *supra,* at 175).

Third, the existence of experience rating systems has been seen as an argument *favoring* the elimination of labor-dispute disqualifications, because such a system may encourage employers to instigate a labor dispute where layoffs are contemplated, in order to avoid an increase of taxes:

> "Moreover, under systems in which the denial of benefits to large numbers of persons has an immediate effect on the rate of contributions which an employer is required to pay, it is questionable whether neutrality is effected by the denial of benefits. An employer, who knows that because of slackness of trade or for other reason he may be forced to close his business or lay off a certain class of workers may by the disqualification be encouraged to precipitate a dispute." (Lesser, *supra,* at 175; see also Fierst & Spector, *supra,* at 464; Schindler, *supra,* at 863, 881.)

Fourth, and finally, the commentary makes clear that the states have *not,* through the labor dispute disqualification provisions, avoided embroiling the state administrative agency in problems between unions and management. For, the state laws involve determinations on questions such as whether there was a strike or a lockout; whether there is indeed a "dispute", or a "labor dispute"; whether the discharges were in fact "due" to a labor dispute or occurred for some other reason; and whether there has been a "stoppage of work" due to such dispute. See Fierst & Spector, *supra,* at 469-489. Both elimination entirely of labor dispute disqualifications, and specifically pegging them to the merits of labor disputes, has been justified on this basis—that is, that a true laissez-faire policy under state unemployment

statutes is not a possibility. See Fierst & Spector, *supra;* Lesser, *supra.*

Thus, the question whether it is payment of benefits to some or all workers affected by labor disputes, or denial thereof, which represents government "neutrality" is at least strongly debatable. Moreover, even if one were to determine that some general principle could in fact be derived solely from the generalities of the national labor policy, to embody that policy in a workable standard for state statutes would entail judicial legislation of an extraordinary nature.

As the short discussion of labor dispute disqualification provisions included in the Appendix to this Brief illustrate, the variation among state laws on the labor dispute question is enormous.[36] If a principle of neutrality with regard to labor disputes were erected as a requirement of federal supremacy, it would be necessary for the courts to determine as a matter of law the myriad issues the state legislatures have resolved, and resolved variously, as a matter of policy. For example, courts would be constrained to determine whether the principle applied to lockouts as well as strikes; whether it required extending the disqualification beyond those actively supporting the strike and, if so, to whom; whether an exception must be created where the employer himself has acted contrary to the national labor policy—for example, by committing an unfair labor practice, by discrimi-

[36]Even the wide array of present statutes does not exhaust all the possibilities. In the past, there have been variants which do not now exist. See Schindler, *supra,* at 862, 876; Lesser, *supra,* at 170 n.10.

nating on the basis of race or sex, by breaching a collective bargaining agreement, or by disregarding occupational safety and health standards; whether the disqualification may cease once the claimant has obtained, and lost for reasons beyond his control, a second job and, if so, how long that second job must be held; whether the disqualification should cease once a settlement of the dispute has been reached, or only when work is once again available; and whether the disqualification must, or may, apply even if the striker is permanently replaced, or the employer subsequently stops operations entirely, or for some other reason the employment relationship is severed entirely.[37]

Each of these issues is addressed in the state laws and in the decisions construing them. Each may have some effect on the balance of economic power in labor

[37]For example, in *Kimbell, Inc. v. Employment Security Commission,* 429 U.S. 804, this Court dismissed for want of a substantial federal question a case in which a state court had held valid a state law paying benefits to strikers as long as the employer continued in substantial operation but not thereafter. If the decision of the Court of Appeals in this case is reversed, the question will have to be faced whether to extend that result to the *Kimbell* variant, which is much more prevalent than the time-limited disqualification imposed in New York. (See Appendix to this Brief). Cogent arguments could be made suggesting that the *Kimbell* version is "neutral" even if the New York one is not. For, the *Kimbell* version continues payments only as long as the employer is deriving income as well; one could view that principle as one of true "neutrality."

We are not suggesting, of course, that the Court make any such distinction. Rather, we believe that the *Kimbell* result was correct, and that it is fully applicable to this case. But, that is because *Kimbell* was presumably based on the fact that, as the Memorandum for the United States as Amicus Curiae in *Kimbell,* demonstrated, and we demonstrate above, Congress did not intend for the courts to make such distinctions. Rather, it intended to permit free reign to the states on the labor dispute problem.

disputes. For courts to resolve these matters with only the broad outlines of the national labor policy as a beacon would be to undertake precisely the delicate interest-balancing which Congress, in 1935 and subsequently, has declined to attempt in a nationally uniform manner.[38]

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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(Appendix Follows)

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[38]This endeavor could also lend credence to similar arguments in cases entirely outside the area of social benefits. For example, if the principle of governmental economic neutrality during labor disputes were erected into a rule supervening all other considerations, one might conclude that the government could not enter into any contract with an employer at whose establishment there was a labor dispute, or that the government would be compelled to defer payment of all funds during the term of such a dispute under any such contract previously entered into.

APPENDIX

Appendix

(Excerpt from U.S. Department of Labor, Comparison of State Unemployment Insurance Laws (1975) (Pages 4-10 to 4-12))

445 Labor Disputes

Unlike the disqualifications for voluntary leaving, discharge for misconduct, and refusal of suitable work, the disqualifications for unemployment caused by a labor dispute do not involve a question of whether the unemployment is incurred through fault on the part of the individual worker. Instead, they mark out an area that is excluded from coverage. This exclusion rests in part on an effort to maintain a neutral position in regard to the dispute and, in part, to avoid potentially costly drains on the unemployment funds.

The principle of "neutrality" is reflected in the type of disqualification imposed in all of the State laws. The disqualification imposed is always a postponement of benefits and in no instance involves reduction or cancellation of benefit rights. Inherently, in almost all States, the period is indefinite and geared to the continuation of the dispute-induced stoppage or to the progress of the dispute.

445.01 Definition of labor dispute.—Except for Alabama and Minnesota, no State defines labor dispute. The laws use different terms; for example, labor dispute, trade dispute, strike, strike and lockout, or strike or other bona fide labor dispute. Some States exclude lockouts, presumably to avoid penalizing workers for the employers action; several States exclude disputes resulting from the employer's failure to

conform to the provisions of a labor contract; and a few States, those caused by the employer's failure to conform to any law of the United States or the State on such matters as wages, hours, working conditions, or collective bargaining, or disputes where the employees are protesting substandard working conditions (Table 405).

445.02 Location of the dispute.—Usually a worker is not disqualified unless the labor dispute is in the establishment in which the worker was last employed. Idaho omits this provision; North Carolina, Oregon, Texas, and Virginia include a dispute at any other premises which the employer operates if the dispute makes it impossible for the employer to conduct work normally in the establishment in which there is no labor dispute. Michigan includes a dispute at any establishment within the United States functionally integrated with the striking establishment or owned by the same employing unit. Ohio includes disputes at any factory, establishment, or other premises located in the United States and owned or operated by the employer.

445.03 Period of disqualification.—In most States the period of disqualification ends whenever the "stoppage of work because of a labor dispute" comes to an end or the stoppage ceases to be caused by the labor dispute. In other States, disqualifications last while the labor dispute is in "active progress," and in Arizona, Connecticut, Idaho, and Ohio, while the workers' unemployment is a result of a labor dispute (Table 405).

A few State laws allow individuals to terminate a disqualification by showing that the labor dispute (or the stoppage of work) is no longer the cause of their unemployment. The Missouri law specifies that bona fide employment of the claimant for at least the major part of each of 2 weeks will terminate the disqualification; the Michigan law provides that if a claimant works in at least 2 consecutive calendar weeks, and earns wages in each week of at least the weekly benefit amount based on employment with the employer involved in the labor dispute, the disqualification will terminate; and the New Hampshire law specifies that the disqualification will terminate 2 weeks after the dispute is ended even though the stoppage of work continues. In contrast, the Arkansas, Colorado, and North Carolina laws extend the disqualification for a reasonable period of time necessary for the establishment to resume normal operations; and Michigan and Virginia extend the period to shutdown and startup operations. Under the Maine, Massachusetts, New Hampshire, and Utah laws, a claimant may receive benefits if, during a stoppage of work resulting from a labor dispute, the claimant obtains employment with another employer and earns a specified amount of wages (Table 405). However, base-period wages earned with the employer involved in the dispute cannot be used for benefit payments while the stoppage of work continues.

Only two States provide for a definite period of disqualification. In New York a worker, unemployed because of a strike or lockout in the establishment

where such individual was employed, can accumulate effective days after 7 weeks and the waiting period, or earlier if the controversy is terminated earlier. In Rhode Island a worker unemployed because of a strike in the establishment in which such worker was employed is entitled to benefits for unemployment which continues after a 6-week disqualification period and a 1-week waiting period. In addition to the usual labor dispute provision, Michigan, in a few specified cases, disqualifies for 6 weeks in each of which the claimant must either earn remuneration in excess of $25 or meet the regular eligibility requirements, plus an equal reduction of benefits based on wages earned with the employer involved.

In Indiana termination of employment with the employer involved in the dispute is sufficient showing that the unemployment is not caused by the dispute.

445.04 Exclusion of individual workers.—Alabama, California, Delaware, Kentucky, New York, North Carolina and Wisconsin do not exempt from disqualification those workers who are not taking part in the labor dispute and who have nothing to gain by it. In Minnesota an individual is disqualified for 1 week if the individual is not participating in or directly interested in the labor dispute. In Texas the unemployment must be caused by the claimant's stoppage of work. Utah applies a disqualification only in case of a strike involving a claimant's grade, class, or group of workers if one of the workers in the grade, class, or group fomented or was a party to the strike; if the employer or employer's agent and any of the workers

or their agents conspired to foment the strike, no disqualification is applied. Massachusetts provides specifically that benefits will be paid to an otherwise eligible individual from the period of unemployment to the date a strike or lockout commenced, if such individual becomes involuntarily unemployed during negotiations of a collective-bargaining contract. Minnesota provides that an individual is not disqualified if he is dismissed during negotiations prior to a strike, if he is unemployed because of a jurisdictional dispute between two or more unions, or if unemployment is caused by an employer's willful failure to comply with either Federal and State occupational safety and health laws or safety and health provisions in a union agreement. Ohio provides that the labor dispute disqualification will not apply if the claimant is laid off for an indefinite period and not recalled to work prior to the dispute or was separated prior to the dispute for reasons other than the labor dispute, or if he obtains a bona fide job with another employer while the dispute is still in progress. Connecticut provides that an apprentice, unemployed because of a dispute between his employer and journeymen, shall not be held ineligible for benefits if he is available for work. Indiana excludes from disqualification individuals not recalled after the labor dispute has been terminated and sufficient time to resume normal activities has elapsed. The other States provide that individual workers are excluded if they and others of the same grade or class are not participating in the dispute, financing it, or directly interested in it, as indicated in Table 405.